

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32468

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 574
	)	
Plaintiff-Respondent,	)	Filed: August 1, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DEE ALAN RHOADES,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Richard T. St. Clair, District Judge.

Order denying I.C.R. 35 motion to reduce sentence, affirmed.

Nevin, Benjamin, McKay and Bartlett; Dennis A. Benjamin, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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WALTERS, Judge Pro Tem

This is an appeal from an order denying a motion under Idaho Criminal Rule 35 for reduction of a sentence. We affirm.

I.

BACKGROUND

Dee Alan Rhoades was charged with delivery of a controlled substance, methamphetamine, in violation of I.C. § 37-2732(a)(1)(A). The State also charged, as a sentencing enhancement, that the delivery of the methamphetamine took place within 1000 feet of a school. Pursuant to a plea agreement, Rhoades pled guilty to an amended charge of possession of a controlled substance, I.C. § 37-2732(c)(1), and the State agreed to dismiss the sentencing enhancement allegation. There was no agreed recommendation as to the appropriate sentence. The agreement provided further that Rhoades waived his right to appeal the judgment of conviction and sentence. On July 18, 2005, Rhoades was sentenced to the custody of the Board of Corrections for a seven-year term with three years fixed as the minimum period of

confinement, and a written judgment of conviction was filed on July 19. Two days later, Rhoades filed a motion under I.C.R. 35 for reduction of his sentence, requesting that the sentence be reduced because it was unduly harsh. He also filed, on August 23, a notice of appeal, indicating he would challenge the sentence as an abuse of discretion.

A series of hearings on the Rule 35 motion were held in August and September of 2005. An evidentiary hearing on the motion was commenced on October 12 but the hearing was not completed and the remainder of the hearing was scheduled for October 17. The October 17 hearing was rescheduled and continued to November 7. On November 7, Rhoades moved for appointment of substitute counsel, and the Rule 35 hearing was postponed to November 21. On November 21, the hearing was again continued.

The evidentiary hearing was finally resumed on December 6 and 12, 2005. On December 12, the parties stipulated to proceed without a court reporter, expecting to rely on a court-provided electronic tape-recording of the proceedings. During the hearing on December 12, however, the tape expired and the recording ended while the court was announcing its ruling denying the motion. A week later, on December 19, 2005, the court entered a written order denying the motion for reconsideration of Rhoades' sentence. In January 2006, Rhoades filed a motion under I.C.R. 33(c) to withdraw his plea of guilty, which was denied by the court on March 6, and on April 10, 2006, Rhoades filed another notice of appeal, referring to the denials of his Rule 35 and 33(c) motions.<sup>1</sup> This appeal ensued.

## **II.**

### **ISSUES**

Rhoades submits two issues for consideration on this appeal. First, he contends that the order denying his Rule 35 motion should be vacated and the case remanded to the district court

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<sup>1</sup> The record does not contain a written order by the court denying Rhoades' motion under I.C.R. 33(c) to withdraw his guilty plea. There is, however, an order filed on March 13 that denies a motion by Rhoades to reduce his sentence. It appears that this order (which was identical to the order that had been entered on December 19, 2005) was inadvertently entered instead of an order relating to the Rule 33(c) matter, inasmuch as the court had already entered an order denying the Rule 35 motion on December 19, 2005, and there was no request made during the Rule 33(c) hearing to revisit the Rule 35 issue. Furthermore, a request to reconsider the prior denial of a Rule 35 motion to reduce a sentence is improper. *See State v. Bottens*, 137 Idaho 730, 52 P.3d 875 (Ct. App. 2002).

for further proceedings because there is no transcript of the district court's reasoning in denying the motion, due to the failure of the tape-recording at the hearing, and the district court did not enter any written findings of fact or conclusions of law expressing its rationale for denying the motion. He couches his argument in this regard in terms of a denial of due process. Second, he argues that the district court abused its discretion in denying the Rule 35 motion.

In response, the State raises a number of concerns. First, the State submits that the appeal should be dismissed because Rhoades is violating the plea agreement by seeking appellate review of his sentence, albeit in the guise of challenging the denial of his motion to reduce the sentence. Next, the State contends that if the appeal is not barred by Rhoades' plea agreement not to seek appellate review of his sentence, the district court lacked jurisdiction to decide the Rule 35 motion because most of the hearing on the motion was conducted and the ruling itself was made beyond the 120-day jurisdictional limit of Rule 35. Finally, the State argues that even if the appeal is not dismissed and even if the district court had jurisdiction to decide Rhoades' Rule 35 motion, Rhoades has failed to show that the district court abused its discretion in denying the Rule 35 motion.

### **III. DISCUSSION**

Before addressing the merits of the issues raised by Rhoades, we will discuss the positions asserted by the State. We note first that, pursuant to Idaho Appellate Rule 17, the notice of appeal filed by Rhoades on August 23, 2005, following the entry of the judgment of conviction and order imposing sentence, automatically carried with it the inclusion on appeal of "all . . . orders . . . entered after the judgment, order or decree appealed from." I.A.R. 17(e)(1)(C); *See State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993). Thus, even if Rhoades was precluded by the plea agreement from directly challenging the judgment and sentence, the notice of appeal was valid as to other rulings in the case. It was not necessary for Rhoades to later file another notice of appeal, as he did on April 10, 2006, to obtain appellate review of the order denying his Rule 35 motion. Furthermore, we do not agree with the State that Rhoades violated the plea agreement by appealing from the denial of his motion to reduce his sentence. The plea agreement prohibited Rhoades from appealing the judgment of conviction and the sentence. The Rule 35 motion was a post-judgment motion that could not be considered by the court until after a sentence was imposed. The plea agreement did not explicitly prohibit

Rhoades from appealing from an order denying a post-judgment motion. We have held that a defendant who has waived the right to appeal a judgment of conviction and sentence is not barred from appealing the denial of a post-judgment motion for reduction of his sentence under I.C.R. 35. *State v. Holdaway*, 130 Idaho 482, 943 P.2d 72 (Ct. App. 1997). Accordingly, we decline to dismiss this appeal because of the alleged violation of the plea agreement between the State and Rhoades.

We also reject the State's contention that the district court lost jurisdiction to decide Rhoades' Rule 35 motion. We recognize that if a trial court fails to rule upon a Rule 35 motion within a reasonable time after the limit within which to file the motion under the rule, the trial court loses jurisdiction. *State v. Chapman*, 121 Idaho 351, 354, 825 P.2d 74, 77 (1992). When a Rule 35 motion for reduction of sentence has been filed, the defendant's attorney carries the burden of precipitating action on the motion within a reasonable time or otherwise providing adequate justification for a delay. *State v. Bromgard*, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003). Failure to do so creates the risk that the trial court will lose jurisdiction to consider the motion. *Id.* A significant period of delay is unreasonable, leading to a loss of jurisdiction, where the record is silent as to a viable basis for the delay. *See State v. Payan*, 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct. App. 1998).

Here, Rhoades' motion was filed on July 21, 2005, two days after the judgment of conviction was entered and well within the 120-time limit set by I.C.R. 35 for filing the motion. The record shows that hearings were scheduled and held during the ensuing months of August, September, October, November and December of the same year, demonstrating that Rhoades' attorney, including substitute counsel, was actively pursuing the motion. The trial court entertained evidentiary hearings on October 12, December 6 and December 12. The court orally explained its decision to deny the motion at the conclusion of the December 12 hearing, which was 36 days past the 120-day time limit allowed by Rule 35 to file the motion, and the court then entered a written order denying the motion on December 19, 2005. The court's ruling on the motion was certainly expeditious and without delay once the evidentiary submission was completed. We conclude that the span of time that expired while Rhoades' motion was being pursued was not unreasonable under the circumstances and did not divest the district court of jurisdiction to decide the motion. *Compare State v. Shumway*, 144 Idaho 580, 165 P.3d 294 (Ct. App. 2007) (156 days from judgment to decision on motion); *State v. Fisch*, 142 Idaho

781, 133 P.3d 1246 (Ct. App. 2006) (106 days from judgment and 200 days from motion); *State v. Veloquio*, 141 Idaho 154, 106 P.3d 480 (Ct. App. 2005) (150 days from judgment to decision on motion).

We now turn to the issues raised by Rhoades. As his first issue, Rhoades maintains that because the transcript of the final hearing before the district court on the Rule 35 motion does not contain the court's rationale for denying the motion, as a result of the termination of the tape-recording of the proceeding, this case should be remanded to the district court with directions to the district judge to enter findings of fact and conclusions of law explaining his reasons for denying the motion. He makes this request despite the fact that during the pendency of this appeal and before he had filed his appellant's opening brief, Rhoades filed a motion with the Idaho Supreme Court for that same relief. This motion was denied by the Court, and Rhoades now argues that as a matter of due process he should be provided with a written explanation of the trial court's reasons for denying the Rule 35 motion.

We disagree. The Supreme Court of Idaho recently denied similar relief in a comparable situation. In *State v. Strand*, 137 Idaho 457, 50 P.3d 472 (2002), the defendant appealed from an order denying his motion under Rule 35 for a reduction of his sentence. At the hearing on his motion in the district court, no testimony was presented but arguments of counsel were made to the court. On appeal, Strand moved for an order to augment the record on appeal with a transcript, to be prepared at public expense, of the hearing on his Rule 35 motion. The Supreme Court denied the motion to augment. Strand then argued in the merits of his case that due process required that he be provided with the transcript in question. In response, the Court explained that the requested transcript would not have contained any evidence submitted at the hearing but only the arguments of counsel. The Court said:

A transcript of the hearing is not necessary for the Defendant to argue on appeal why it was an abuse of discretion for the district court not to grant the leniency requested. In fact, a defendant does not even have the right to a hearing on a motion for reduction of sentence, *State v. Hoffman*, 112 Idaho 114, 730 P.2d 1034 (Ct.App.1986); IDAHO R. CRIM. P. 35, nor is the district court required to enter findings to support its denial of the motion, *State v. Ojeda*, 119 Idaho 862, 810 P.2d 1148 (Ct.App.1991).

*Strand*, 137 Idaho at 463, 50 P.3d at 478.

Here, a transcript of the evidence presented at the hearing on Rhoades' motion was prepared and filed in the appeal. That transcript lacks only the closing statements made by the

district court in explaining its ruling. To that extent, it does not differ from the circumstances in *Strand*. Furthermore, the Court observed in *Strand* that the district court is not required to enter findings to support its denial of the motion to reduce a sentence. *Id.* It is clear that Rhoades does not have a due process right to have the case remanded for the entry of findings by the district court.

Finally, we consider Rhoades' argument that the district court abused its discretion by denying his motion to reduce the sentence. A motion under I. C.R. 35 to reduce an otherwise lawful sentence is a plea for leniency. *State v. Wright*, 134 Idaho 73, 996 P.2d 292 (2000). The decision of whether to grant a plea for leniency is in the sound discretion of the sentencing court and is reviewed for an abuse of discretion. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999). If the initial sentence was not excessive when imposed, the appellant must show on appeal that it is excessive in light of new or additional information subsequently presented to the sentencing court in support of the motion to reduce the sentence. On appeal we examine the record, including the evidence presented in connection with the motion, to determine whether the trial court abused its discretion in failing to grant the leniency requested. *Strand*, 137 Idaho at 463, 50 P.3d at 478.

Rhoades waived the right to seek appellate review of his sentence, and consistent with that understanding he does not assert on this appeal that his sentence was excessive. We must therefore accept the premise that the sentence was not excessive when it was imposed. Rhoades presented evidence of his conduct that occurred after pleading guilty but before sentencing that had not been presented at the sentencing hearing. The district court did not accept this evidence as a basis to reduce Rhoades' sentence. After reviewing the record, we are not persuaded that the district court abused its discretion in that regard. Accordingly, we uphold the district court's order denying relief under Rule 35.

#### **IV.**

#### **CONCLUSION**

The order denying Rhoades' motion for reduction of sentence under I.C.R. 35 is affirmed.

Judge LANSING and Judge PERRY **CONCUR.**